IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Scurvey*, 2006 YKSC 26

Date: 20060404
Docket No.: S.C. No.: 05-01518
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

JOHN BENJAMIN SCURVEY

APPLICANT

Before: Mr. Justice L.F. Gower

Appearances:

Michael Cozens — For the Respondent
Elaine B. Cairns — For the Applicant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a bail review application under s. 520 of the *Criminal Code*. The accused was detained by a Justice of the Peace on March 24, 2006, primarily on the secondary grounds under s. 515(10)(b) of the *Code*. The issue is whether the accused has shown cause why his detention is not justified under either the secondary or tertiary grounds.

BACKGROUND

[2] The accused was originally charged with a sexual assault alleged to have occurred on May 7, 2005. Alcohol was allegedly involved in that incident. He was released on a promise to appear and an undertaking given to a peace officer on May 11. The conditions of that undertaking were minimal, but included abstaining from the possession and consumption of alcohol. The trial date for that charge was set for October 12, 2005.

[3] The accused failed to appear for the sexual assault trial, claiming that he had misunderstood it was set for October 13. On that day, he turned himself into custody and was immediately released on his own recognizance in an amount of $500, without cash deposit. There were five conditions attached to that recognizance, again including an abstention from alcohol condition.

[4] On the evening of October 13, 2005, just after being released on his own recognizance, the accused was arrested for being intoxicated. He was held in custody for a few days, but ultimately released a third time, once again on his own recognizance, this time with a $500 cash deposit. The conditions of the second recognizance remained the same as before, including the abstention from alcohol condition.

[5] The sexual assault charge was rescheduled for trial in January, but it had to be adjourned to March 22, 2006 in order to allow the accused to retain new counsel, as his previous counsel had withdrawn from the record when the accused failed to appear on October 12, 2005.

[6] On March 20, 2006, two days before the sexual assault trial, the accused was arrested for assault at 10:45 p.m. in a severely intoxicated condition. He blew 185 milligrams percent upon giving a breath sample. He and another individual were seen holding on to the alleged male victim, and the accused was witnessed punching and kicking this person. He was charged under s. 266 of the *Criminal Code* and the Crown elected to proceed by summary conviction. In addition, he was charged with breaching his recognizance for being intoxicated. That resulted in him having to show cause why his detention in custody was not justified, pursuant to s. 515(6)(c) of the *Criminal Code*. The show cause hearing took place before a Justice of the Peace on March 24 and, as I have indicated, the accused was detained on the secondary grounds.

[7] The sexual assault trial began on March 22, but has been adjourned to April 20, 2006 for continuation.

ANALYSIS

The Standard of Review

[8] In *R.* v. *Taylor*, 2004 YKSC 16, I held that the standard of review on these types of applications is, as suggested by the Manitoba Court of Appeal in *R.* v. *Carrier* (1979), 51 C.C.C. (2d) 307, that the reviewing court may exercise independent discretion, with due regard for the original order, regardless of whether fresh evidence is introduced.

The Secondary Grounds

[9] Under s. 515(10)(b) of the *Criminal Code*, the court must be satisfied that there is a “substantial likelihood” that the accused will, if released from custody, either commit a further criminal offence or interfere with the administration of justice. Of course, that is in

the context of considering whether detention of the accused is necessary for the protection or safety of the public.

[10] The Justice of the Peace was principally concerned with the fact that the accused appears to have an alcohol problem which results in his involvement with the police and the courts. He was further concerned that there was little or nothing in the release plan of the accused to address that problem. He implicitly referred to the allegation that alcohol was involved in the sexual assault charge, as well as on the two subsequent occasions when the accused was charged with breaching his release conditions. He said at para. 6 of *R.* v. *Scurvey*, 2006 YKTC 30:

> ". . . So when you combine an alcohol problem with potential violence, it becomes very, very difficult for the Court to say, well we can take a chance, because if we are wrong, quite possibly somebody could get hurt."

Later, at para. 9, he said:

> "If this was the first one, ultimately, we would have taken a chance. That is what happened is the Courts [as written] took a chance after the first one and you did get your release. I do not feel that I can take a chance at this time. The secondary grounds, I do not think can be met. Your detention is on the secondary grounds. . . ."

[11] To the extent that the Justice of the Peace may have meant by this language that the court only had to be satisfied that there was a "possibility" or a "chance" that the accused would commit a further criminal offence if released, then, with respect, he was in error. As was stated by the Supreme Court of Canada in *R.* v. *Morales*, [1992] 3 S.C.R. 711, the bail provisions in the *Criminal Code* are intended to assess the

likelihood of future dangerousness, while recognizing that exact predictions of future dangerousness are impossible. There is no requirement to guarantee the accused will not reoffend if released. Further, s. 515(10)(b) clearly requires there to be a “substantial likelihood” that the accused will engage in criminal activity pending trial, in order for his detention to be justified.

[12] However, that is not the end of the matter. The standard of review on these applications is such that I may exercise independent discretion in assessing the facts, allegations and background circumstances. I share the concerns of the Justice of the Peace that the accused appears to have a serious alcohol problem. I take it from the submissions of his counsel, both before the Justice of the Peace and before me, that the willingness of the accused to undertake an alcohol assessment and counselling, if directed by his bail supervisor, is the beginning of a recognition by the accused that he may indeed have such a problem.

[13] Alcohol was allegedly involved in the circumstances giving rise to the sexual assault charge. To his credit, the accused managed to remain out of trouble for a number of months after his release on that charge on May 11, 2005. However, it is very disturbing to me that, after missing the first trial date and turning himself into custody, the very evening of the day that he is released on his own recognizance, he is charged with breaching that recognizance by being intoxicated. I say that because one would naturally assume that the accused would be motivated to be on his best behaviour after being released not once, but a second time on a serious charge and so shortly after the risk of being held in jail pending the trial of that charge would have been brought to his

attention. Despite that step back, the accused was given a third chance and was released again on his recognizance on October 18, 2005.

[14] Once more, to his credit, the accused managed to stay out of trouble until he was charged a second time with breaching his release conditions by being intoxicated, along with assault. That was two days before his trial on the sexual assault charge. Once again, I would have expected that it would have been at the forefront of the accused's mind to try and stay out of trouble until the sexual assault charge was disposed of. However, the explanation given by the accused is that he had just received news that day that one of his friends had committed suicide by hanging himself some weeks earlier. He was extremely upset by this news and called his mother to discuss it. According to his counsel, his mother suggested that he be with his friends and try to take care of himself. Whatever else happened on that day, the accused allegedly became intoxicated in reaction to this upsetting news.

[15] I recognize that in the *Morales* case, cited above, it was stated that the bail system does not function properly if individuals commit crimes while released on bail. On the other hand, in *R.* v. *Hall* (2002) 167 C.C.C. (3d) 449, the Supreme Court of Canada stated at page 466 that judges must be satisfied that detention is not only advisable, but necessary. In my view, if a court is satisfied that the release of an accused person can be justified by the imposition of appropriately strict conditions, then his or her detention is not necessary.

[16] The accused is a 20-year-old male and is a member of the Champagne and Aishihik First Nations. It is very noteworthy that he has no criminal record to date. His mother, Darlene Jim, has been described by counsel as having had her own problems

with alcohol, but she has been sober for approximately the last month or so and does not allow drinking in her home. She attended court for this bail review and is prepared to serve as a surety for the accused in the amount of $500, without a cash deposit. She is apparently aware that she could easily become liable to pay that amount into court if the accused commits a further criminal offence while on release. The evidence is that the accused has a good relationship with his mother and that he is actively involved in helping her raise his two younger brothers, aged 9 and 5, who all live together with Ms. Jim at her residence on 54 McIntyre Drive, in Whitehorse.

[17] There is also evidence that the accused has met regularly with his previous bail supervisor, Mr. Hyde. Mr. Hyde addressed me on this bail review and confirmed that fact. He was involved with the accused, as I understand it, from about the time of his release on October 18, 2005 until his arrest on March 20, 2006. He says that he normally arranges weekly meetings with the accused, but that additional “knock and talk” curfew checks can be arranged on a random basis, using both the resources of the adult probation office and the RCMPolice. He also indicated that the accused could begin an alcohol assessment and counselling while awaiting his trial. If I release the accused on this application, I would expect that Mr. Hyde would make his best efforts to see that these things are done.

[18] The accused also deposed to his willingness to abide by a number of other specific conditions as part of his release, many of which have not yet been imposed in his previous undertaking or the two previous recognizances. It is also important to remember that the accused currently has $500 of his own money on deposit, which he

may already have forfeited by his most recent breach charge, but will almost certainly forfeit if he is charged yet again.

[19] In the result, with respect to the secondary grounds, I am satisfied that the accused has shown cause that it is not necessary for the protection or safety of the public to detain him and that there is no substantial likelihood that he will commit a further criminal offence or interfere with the administration of justice if he is released from custody on appropriately strict conditions, which I will come to shortly.

The Tertiary Grounds

[20] The Crown also submitted on this application that I should consider the tertiary grounds for justifying the detention of the accused under s. 515(10)(c) of the *Criminal Code*. That provision speaks of circumstances where detention is necessary "in order to maintain confidence in the administration of justice," having regard to circumstances such as:

1. The apparent strength of the prosecution's case;
2. The gravity of the nature of the offence;
3. The circumstances surrounding the commission of the offence; and
4. The potential for a lengthy term of imprisonment.

[21] With respect to the sexual assault charge, I know little of the apparent strength of the prosecution's case, other than the allegations that alcohol was involved, that the complainant was under the age of 14 and was therefore legally incapable of consenting, and that, in any event, she was apparently too intoxicated to consent. The accused's likely defence is that he took all reasonable steps to ascertain the complainant's age. There is also a suggestion from his counsel that the complainant was interested in

pursuing a relationship with the accused. Further, while that alleged offence is clearly a very serious one, from what I know of its gravity and the circumstances surrounding its commission, it does not appear that a conviction would result in a lengthy term of imprisonment, at least not one in excess of two years in jail.

[22] As for the alleged assault, while there are two Crown witnesses besides the alleged victim, I am told those witnesses were some distance away and viewed the scene from within a nearby building through a window. It appears that the initial allegation by the Crown that the victim was beaten unconscious may be successfully challenged by the defence. In any event, it does not appear that the gravity of that particular alleged offence or the circumstances surrounding its commission would indicate a particularly lengthy term of imprisonment upon conviction.

[23] Once again, with respect to the tertiary grounds, I refer to the case of *R.* v. *Hall*, cited above. In that case, the Supreme Court of Canada noted that, at the end of the day, a judge can only deny bail if he or she is satisfied that, in view of the factors I have listed and the related circumstances, a reasonable member of the community would also conclude that denial of bail is necessary to maintain confidence in the administration of justice. The reasonable person making that assessment must be properly informed about the philosophy of the bail provisions in the *Criminal Code*, the related *Charter* values and the actual circumstances of the case. The *Charter* values referred to are, of course, primarily those arising from s. 11(e) of the *Charter*, which gives any person charged with an offence the constitutional right not to be denied reasonable bail without just cause. Applying the standard in *Hall*, I am not satisfied that it is necessary to detain the accused to maintain the public’s confidence in the

administration of justice. Rather, I find that such confidence could be maintained with appropriately strict release conditions.

CONCLUSION

[24] Pursuant to s. 520(7)(e) of the *Criminal Code*, I vacate the order made by the Justice of the Peace on March 24, 2006 and release the accused on a recognizance, with a $500 cash deposit by him. In addition, Darlene Jim will be named as a surety in the amount of $500, without a cash deposit. The conditions of the recognizance will require the accused to:

i. appear before the Court when required to do so;

ii. report immediately upon his release to a bail supervisor and thereafter as often as and in the manner directed by the bail supervisor;

iii. abstain absolutely from possession, consumption or purchase of alcohol and the non-medical use of drugs and submit to a breath analysis and bodily fluids test upon reasonable demand by a peace officer or bail supervisor who has reason to believe that he has failed to comply with this condition;

iv. not attend any premises where the primary purpose is the sale of alcohol;

v. attend for alcohol assessment and counselling as directed by the bail supervisor;

vi. reside at 54 McIntyre Drive, Whitehorse, Yukon, or such other place as is approved in advance in writing by the bail supervisor;

vii. abide by a daily curfew of 9:00 p.m. to 6:00 a.m., except with prior written permission of the bail supervisor;

viii. answer all telephone calls and knocks or rings at your door, so that your bail supervisor, or a member of the RCMPolice, can check that you are inside your residence during the curfew periods. In addition, you must allow such persons to enter your residence in order to ensure that you are abiding by the conditions of your recognizance;

ix. have no contact with Shanay Pete, Darren Johnny, Bobby George, Megan Freese and Alcina Banks;

x. make reasonable efforts to seek and maintain employment or schooling and advise the bail supervisor of those efforts;

xi. abstain from being in the presence of people who, to your knowledge, are intoxicated or illegally consume, possess or traffic in narcotics or drugs; and

xii. remain within the Yukon Territory, except with prior written permission of the bail supervisor.

[25] I note for the record that the accused has, through his counsel, indicated his consent to condition (iii), above, respecting the provision of breath or bodily fluid samples to detect whether he has been consuming alcohol.

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GOWER J.